IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.663 OF 1992

Noormohammad Pirmohammad Shaikh
Res. at House No.949,
Shaniwar Peth,
Satara. **..Appellant**

vs.

1. Rashtbi Babulal Shaikh,
since deceased her heirs
and representatives

1a. Shri Rajauddin Abba Shaikh

1b. Shri Yusuf Abba Shaikh

1c. Shri Mohsin Yusuf Shaikh,
minor through legal guardian
Shri Yusuf Abba Shaikh

1d. Shri Yunus Yusuf Shaikh,
minor through legal guardian
Shri Yusuf Abba Shaikh

1a to 1d all residing at
9, Durga Peth, Satara City,
Satara.

2. Gautmohammad Pirmohmmad Shaikh,
res. at 1017 Shaniwar Peth,
Satara.

3. Ibrahim Walimohmmad Shaikh,
res. at Shaniwar Peth,
Satara. ..Respondents.

Mr. A.V.Anturkar for Appellant.

Mr. N.V.Walawalkar with Mr.G.H.Keluskar, Advocate for Respondent no.1a to 1d.

CORAM : S.R.SATHE, J.

DATED : 4TH AUGUST, 2004.

ORAL JUDGMENT :

1. Being aggrieved by the Judgment and Order passed by the Court of 3rd Additional District Judge, Satara, in Regular Civil Appeal No.10 of 1987 whereby order dismissing the Plaintiffs suit passed by the Court of C.J.S.D, Satara in Special Civil Suit No.57 of 1978 was confirmed and the appeal was dismissed, the plaintiff has preferred this second appeal.

2. Brief facts giving rise to this appeal are as under :

. Plaintiff Noormohammad Peermohammad Shaikh filed Special Civil Suit No. 57 of 1978 in respect of the property bearing CTS no. 9A and 9B situated at Durga Peth, Satara, wherein he alleged that the said property was initially purchased by Noor Mohammed and the father of Gaus Mohammed i.e. the defendant no.2. Peermohammed was enjoying the said property till his death. After 1946 i.e. after the death of Peer Mohammed , plaintiff and defendant no.2 as well as Daulatbi became the heirs of Peermohammed and thus they were having share in the suit property. The Defendant no.1 Rashtbi purchased some share of

the property from Daulatbi . By virtue of the said sale deed Rashtbi i.e. Defendant no.1 had infact not become the owner of the property in respect of seven anna share. Hence the plaintiff filed the suit for partition and possession on 21.2.1978. In that suit the defendant no.1 filed his written statement at exhibit 23 and raised several contentions. The main contention of the defendant was that the plaintiff had filed insolvency petition no. 3 of 1957, wherein he had specifically stated that he is not the owner of any property including the suit property. The plaintiff was declared insolvent in the said petition. It is therefore contended by the defendant that in view of the said admission given by the plaintiff in insolvency petition the defendant is entitled to get decision of the said suit as per the provisions of Order 12 Rule 6 of C.P.C. and hence the suit be dismissed. The Defendant also took contention with regard to estoppel. Not only that , but the defendant submitted an application - exhibit 81 and prayed that the suit be decided on the basis of the admission of fact, given by the plaintiff in Insolvency petition 3 of 1957. The plaintiff filed his say to the said application at exhibit 88 and opposed the said application.

. After hearing both the learned Advocates, the

learned Trial Judge framed Preliminary issue with regard to Order 12 Rule 6 of C.P.c. and held that in view of the statement made by the Plaintiff in Insolvency Petition as well as having regard to his statement given in the same, decree can be passed on the basis of admission of fact. He, therefore, held that plaintiff is not entitled for relief claimed in the suit and dismissed the same.

. Being aggrieved by the said order, the plaintiff filed First Appeal No.10 of 1987. The first appellate court also held that the provisions of Order XII Rule 6 are applicable and the order passed by the trial court is legal and correct. He, therefore, confirmed the said order and dismissed the appeal. Being aggrieved, the plaintiff filed the present appeal.

3. In this appeal before me, Shri Anturkar, learned advocate for the appellant has urged only two points. Firstly, he submitted that provisions of Order XII Rule 6 of CPC are infact not applicable in the instant case. According to him the statement made by the plaintiff in the Insolvency petition cannot be treated as admission of fact. Besides this, he also submitted that even if it is assumed

that it was an admission as contemplated under Order XII Rule 6 of C.P.C., still then the suit should not have been decided in short slip matter without giving any opportunity to the plaintiff to adduce evidence and explain the alleged admission of fact.

. Secondly, he canvassed before me that Order XII Rule 6 of C.P.C. does not contemplate passing of a decree. At the most only order or judgment can be given. It does not contemplate decree as defined in C.P.C. As against this Shri Walavalkar, learned advocate for the defendant no.1 supported the judgment and order passed by both the courts below. He also submitted that the defendant had also taken contention regarding estoppel and the plaintiff has infact played a fraud and in order to deceive the defendants and the creditors he had filed Insolvency Proceeding No.3 of 1957.

4. In order to find out whether the provisions of Order XII Rule 6 are applicable in the instant case, it would be worthwhile to see what it says. It runs as follows :

Order XII Rule (6)...

(6) Judgment on admissions.

> (1) Where admissions of facts have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.
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> (2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.

5. The learned advocate for the plaintiff strenuously argued before me that in order to find out whether particular statement made by the plaintiff in earlier proceeding would amount to admission of fact, it is necessary to see what was the said statement. In that Insolvency proceeding plaintiff had made a statement that he was not having any other property including suit property. According to the learned Advocate for the appellant the said statement can not be called as a fact as

defined in the Evidence Act. At the most, it can be regarded as an inference drawn from a fact. So, in order to find out whether there is any substance in the argument advanced by the learned advocate for the appellant one has to see the language used in Order XII Rule 6. From perusal of the said provision it appears that the main object of this rule is to enable the party to obtain speedy judgment at least to the extent to which relief is claimed. Besides this, it also appears that this provision can be invoked into at any stage of the suit. It is true that one has to see what the fact means. For that purpose reference can be made to Section 3 of the Indian Evidence Act wherein the context "fact" means and includes-

> (1). anything, state of things, or relation of things, capable of being perceived by the senses:
>
> (2). any mental conditions of which any person is conscious.
>
> *Illustrations*
>
> (a) That there are certain objects arranged in a certain order in a certain place, is a fact.
>
> (b) That a man heard or saw something, is a fact.
>
> (c) That a man said certain words, is a fact.
>
> (d) That a man holds a certain opinion, has a certain intention , acts in good faith or fraudulently, or uses a particular word in a particular sense, is or was at specified

> time conscious of a particular sensation, is a fact.
>
> (e) That a man has a certain reputation, is a fact.

. From the above definition one thing is clear that certain words said by the party amount to a ‘fact’ so also even certain opinion, certain intention also amount to fact. When a person has heard or seen something then also it can be regarded as ‘fact’. If one takes into consideration illustrations and in particular the illustration no. b, c, and d then it is to be said that the statement made by the plaintiff that he his not having any other property including the suit property is an admission of fact. Meaning of fact is not restricted to something which can be exhibited as material object. The statement made by the plaintiff with regard to particular property or about his status in relation to any property is to be regarded as statement of fact and admission. Even if one takes into consideration the definition of admission given in section 17 of the Indian Evidence Act, I think that the statement made by the plaintiff amounts to an admission. It is well settled that an admission is the best evidence against the party making it and there cannot be any better evidence than the admission of a party made by him against his own interest. So, when the plaintiff

had made a statement in the earlier proceeding namely in the Insolvency Petition that he is not having any other property, that has to be treated as an 'admission of fact'.

6. The learned Advocate for the Appellant urged before me that in the instant case the trial court should not have decided the suit without giving any opportunity to the plaintiff to explain the alleged admission of facts. However, if we peruse the application exhibit 81 we find that on receipt of the said application the other side was called upon to give its say and thereafter the plaintiff had infact filed his say at exhibit 88. In that application he had stated that the said statement does not amount to admission of fact and that the order with regard to insolvency has been annulled by the subsequent order and as such infact there does not exist any Insolvency proceeding and the statement made therein. In that say at exhibit 88, the plaintiff had not at all given any explaination regarding the alleged admission of fact. He had nowhere stated that such statement of fact was not given or such statement was made in Insolvency Proceeding under particular circumstances. On the contrary, it appears that it is an admitted fact that such statement was made by him. So, if really he had any intention to adduce

any evidence in that behalf or to give explaination about the alleged admission of fact then he could have very well filed his say to that effect, but that has not happened. Naturally, the learned trial court decided the preliminary issue only after hearing the arguments of both the learned advocates. Having regard to this position, I do not think that there is any substance in the argument advanced on behalf of the plaintiff that no proper opportunity was given to the plaintiff to explain the alleged admission of facts, and as such the order passed by the trial court is illegal.

7. It was argued on behalf of the plaintiff that Order 12 Rule 6 of C.P.C. does not use the word ‘decree’ just as the same is used in order 9. So, according to plaintiff’s advocate the order with regard to dismissal of a suit passed in the matter is illegal. However, if we read Order XII Rule 6(2), it says : " Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced." So, it is very clear that there is no substance in the argument advanced by the learned advocate for appellant in this behalf.

7. From the perusal of the judgment of the lower appellate court is is very clear that the lower appellate court has considered the arguments advanced by both the parties and even having regard to the admitted facts, the lower appellate court has rightly held that the order passed by the lower court dismissing the plaintiff’s suit is legal and correct. There is no substance in this appeal. Hence, the appeal is dismissed with cost.

. Parties to act on the copy of this order duly authenticated by the Court Shirestedar.

. C.C. expedited.

(S.R.Sathe, J.)

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